

D.P.U. 89-DS-21

Adjudicatory hearing in the matter of a possible violation of General Laws Chapter 82, Section 40
by Farmer and Sons, Inc., Billerica, Massachusetts.

APPEARANCE: John E. Farmer, President
Farmer and Sons, Inc.
46 Forest Park Avenue
North Billerica, Massachusetts 01862
PRO SE
Respondent

Robert Smallcomb
Division of Pipeline Engineering and Safety
Department of Public Utilities
Boston, Massachusetts 02202
FOR: THE DIVISION OF PIPELINE
ENGINEERING AND SAFETY

I. INTRODUCTION

On December 6, 1989, the Pipeline Safety and Engineering Division ("Division") of the Department of Public Utilities ("Department") issued a Notice of Probable Violation ("NOPV") to Farmer and Sons, Inc. ("Respondent"). The NOPV stated that the Division had reason to believe that the Respondent performed excavations on September 21, 1989, on Cobblestone Road, Andover, Massachusetts, in violation of G.L. c. 82, § 40 ("Dig-Safe Law"). The Respondent allegedly failed to tender proper notification to Bay State Gas Company ("Bay State"), and failed to exercise reasonable precaution during excavation, causing damage to an underground gas main operated by Bay State.

On December 11, 1989, the Respondent replied by letter, stating that it had not violated the Dig-Safe Law. In that letter, the Respondent asserted that it had acquired a Dig-Safe number for the site, and that the work was continuous from July 18, 1989 through October 13, 1989. The Respondent further stated that a rock rolled off a banking and broke a plastic gas service. In a letter dated January 31, 1990, the Division informed the Respondent of its determination that the Respondent had violated the Dig-Safe Law and informed the Respondent of its right to request an adjudicatory hearing. In that decision, the Division found that the Respondent had failed to tender proper notification because the Dig-Safe number was issued for River Road, Andover, and the location of the damage was on Cobblestone Road, Andover.

The Respondent requested an adjudicatory hearing pursuant to 220 C.M.R. § 99.07 (3). After due notice, an adjudicatory hearing was held on October 16, 1991, pursuant to 220 C.M.R. § 99.00 et seq. Robert Smallcomb, public engineer for the Division, and Mario Reid, compliance officer for the Division, represented the Division. John Farmer, president of John Farmer and

Sons, Inc., testified for the Respondent. The Division offered the following exhibits as evidence: the damage report (Exh. Div-1); the NOPV (Exh. Div-2); the NOPV response from the Respondent (Exh. Div-3); the informal decision (Exh. Div-4); the Respondent's request for an adjudicatory hearing (Exh. Div-5); Dig-Safe request no. 8928-4830 (Exh. Div-6); and a map drafted by Bay State (Exh. Div-7). The Department moved all exhibits into evidence.

II. SUMMARY OF FACTS

A. The Division's Position

The Division received a report of a Dig-Safe violation from Bay State which indicated the Respondent had damaged 10 feet of gas pipeline during an excavation on September 21, 1989, on Cobblestone Road, Andover (Exh. Div-1). The Division alleged that the Respondent failed to tender proper notification to Dig-Safe since the damage occurred on Cobblestone Road, and the Dig-Safe number was for River Road (Tr. at 6-7). In support of the Division's allegation, Mr. Reid testified that the Dig-Safe request stated that the address of the excavation was "River Road, intersection unknown," even though the excavation took place on Cobblestone Road (id. at 15). However, the Division conceded that at the time of the Dig-Safe notice request, Cobblestone Road did not exist, and thus, the Dig-Safe request was not inaccurate (id. at 37, 40).

The Division also alleged that after the Respondent laid the new pipe on Cobblestone Road, it should have called for Dig-Safe markings before it began further excavations (id. at 26). However, the Division conceded that since the pipe was exposed when damaged, a Dig-Safe request was not required (id. at 40).

Finally, during the hearing, Mr. Reid alleged that the Respondent failed to exercise reasonable precaution while excavating (id. at 30). As support for the allegation, Mr. Reid stated

that there were no markings present before excavation, and pointed to the undisputed fact that the Respondent damaged the pipe in question (id. at 31, 53).

B. The Respondent's Position

In opposition to the Division's allegations, Mr. Farmer maintained that the Respondent had been issued a Dig-Safe number effective July 13, 1989, and that it had maintained a continuous presence on the site for the next three months (id. at 5; Exh. Div-3). He testified that since Cobblestone Road did not exist when the Respondent called Dig-Safe for markings, Dig-Safe did not have it listed, and so issued the marking request as "mark in road in red paint", which was the only way to describe the area to be excavated (id. at 6, 42-43). Mr. Farmer testified that, although he was not present at the site when the damage occurred, his workers told him that a rock came down and broke the pipe in half (id. at 34, 49). He stated that the pipe was exposed and visible when the damage occurred, and admitted that his workers were responsible for the accident because they could see exactly where the pipe lay (id. at 23, 27-29).

III. STANDARD OF REVIEW

G.L. c. 82, § 40 states in pertinent part:

Any such excavation shall be performed in such manner, and such reasonable precautions taken to avoid damage to the pipes, mains, wires or conduits in use under the surface of said public way...including, but not limited to, any substantial weakening or structural or lateral support of such pipe, main, wire, or conduit, penetration or destruction of any pipe, main, wire or the protective coating thereof, or the severance of any pipe, main or conduit.

"Reasonable precautions" is not defined in the statute or the Department's regulations, nor do regulations specify approved conduct. Instead, case precedent has guided the Department in the Dig-Safe area. Several recent cases have established the proposition that using a machine to

expose utilities, rather than hand-digging, constitutes a failure to exercise reasonable precautions. See Petricca Construction Company, D.P.U. 88-DS-31 (1990). John Mahoney Construction Co., D.P.U. 88-DS-45 (1990); Northern Foundations, Inc., D.P.U. 87-DS-54 (1990).

In order for the Department to justly construct a case against an alleged violator of the Dig-Safe Law for a failure to exercise reasonable precaution, adequate support or evidence must accompany that allegation. New England Excavating, D.P.U. 89-DS-116, at 9 (1993); Fed. Corp., D.P.U. 91-DS-2, at 5-6 (1992). In addition, the mere fact that a facility was damaged during an excavation does not by itself constitute a violation of the statute. Yukna v. Boston Gas Company, 1 Mass. App. Ct. 62 (1973). In specific instances where there has been an allegation of failure to exercise reasonable precaution without demonstrating any precautions the excavator could or should have taken, the Department has found that the mere fact of damage will not be sufficient to constitute a violation of the statute. Umbro and Sons Construction Company, D.P.U. 91-DS-4 (1992); Fed. Corp., D.P.U. 91-DS-2 (1992); Albanese Brothers, Inc., D.P.U. 88-AD-7 (1990).

IV. ANALYSIS AND FINDINGS

The three issues raised in this case were (1) whether Farmer and Sons failed to tender proper notification, (2) whether they failed to request new markings after a new service was installed, and (3) whether they failed to exercise reasonable precaution during excavation.

With regard to the first two issues, the Division conceded at the hearing that Mr. Farmer did not fail to tender proper notification concerning the Cobblestone Road site because Cobblestone Road did not exist at the time of the Dig-Safe request, and that Mr. Farmer did not

fail to request markings because the site was exposed at the time of damage, and Dig-Safe markings were unnecessary. Therefore, the only remaining issue to be decided is whether the Respondent failed to exercise reasonable precaution during excavation, which resulted in damage to the pipe.

The Division's allegation, that the mere fact of the damage itself constitutes failure to exercise reasonable precaution, is contrary to Department precedent. In specific instances where there has been an allegation without demonstrating any precautions that could or should have been taken, the Department has found that the mere act of damage will not be sufficient to constitute a violation of the statute. See New England Excavating, supra; Umbro, supra; Fed. Corp., supra; Albanese Brothers, supra. Adequate support or evidence must accompany any allegation that an excavator failed to exercise reasonable precautions in order for the Department to justly construct a case against the alleged violator. Fed. Corp., supra.¹

Here, the Division did not demonstrate any precautions the excavator could or should have taken. In fact, the Division did not even fully question the Respondent on the circumstances of the accident.² The Division has not presented adequate support or evidence to sustain its conclusion of a lack of reasonable precaution, and, therefore, the Department finds that the Respondent did not violate the Dig-Safe Law.

¹ The Superior Judicial Court may set aside a decision as prejudiced for further action when that decision is "(e) Unsupported by substantial evidence; or (f) Unwarranted by facts found ... on the record." Substantial evidence is defined as "such evidence as a reasonable mind might accept as adequate to support a conclusion. G.L. c. 30A, §§ 1(6), 14(7). See New England Excavating, supra at 8.

² Several times during the hearing, Mr. Farmer referred to a worker as having "hit" the line, although he also asserted that the line was damaged by a falling rock (Tr. at 23, 27, 35, 49). These statements were not examined by the Division.

V. ORDER

Accordingly, after due notice, hearing, and consideration, the Department

FINDS: That Farmer and Sons, Inc. did not violate the Dig-Safe Law by failing to tender proper notification to the operator of an underground utility before excavating on Cobblestone Road, Andover, Massachusetts, on September 21, 1989; and it is

ORDERED: That the Notice of Probable Violation against Farmer and Sons, Inc. be and hereby is DISMISSED.

By Order of the Department,